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No. 94-1417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOYCE WOODALL and
CONCERNED WOMEN FOR AMERICA,

Plaintiffs/Petitioners

v.

JANET RENO, Attorney General
of the United States, and
UNITED STATES OF AMERICA,

Defendants/Respondents

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. WHETHER CONGRESS EXCEEDED ITS POWERS UNDER THE COMMERCE CLAUSE WHEN IT ENACTED THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248) ("FACE"), AS RECENTLY DETERMINED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN IN *UNITED STATES v. WILSON*, 1995 WL 114802 (E.D. Wisc. Mar. 16, 1995).

2. WHETHER FACE DISCRIMINATES ON THE BASIS OF THE CONTENT OF SPEECH, IN VIOLATION OF THE PRINCIPLES SET FORTH BY THIS COURT IN *REGAN v. TAXATION WITH REPRESENTATION OF WASHINGTON*, 461 U.S. 540 (1983) AND *ARKANSAS WRITERS' PROJECT, INC. v. RAGLAND*, 481 U.S. 221 (1987).

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION

Amicus Curiae, the Legal Center for Defense of Life ("LCDL"), respectfully requests this Court to grant petitioners' petition for a writ of certiorari. In upholding the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248) ("FACE"), the Court of Appeals for the Fourth Circuit decided an important question of federal law which has not been, but should be, settled by this Court. A federal district court has already rendered an opinion which is in direct conflict with the opinion of the court of appeals. *See United States v. Wilson*, 1995 WL 114802 (E.D. Wisc. Mar. 16, 1995).[1] Importantly, the *Wilson* opinion anticipates and is in complete harmony with the logic and rationale of this Court's recent opinion in *United States v. Lopez*, 115 S.Ct. 1624 (April 26, 1995). This Court should therefore grant the petition for the writ of certiorari.

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[1]The authors of this brief are deeply indebted to the opinion of the Honorable Rudolph T. Randa, U.S. District Judge for the United States District Court for the Eastern District of Wisconsin. The arguments in this brief supporting the conclusion that Congress exceeded its Commerce Clause power in enacting FACE come directly from Judge Randa's opinion in *United States v. Wilson*, 1995 WL 114802 (E.D. Wisc. Mar. 16, 1995). This brief is written, in substantial part, to bring Judge Randa's careful and cogent argument before this Court.

ARGUMENT

I. CONGRESS EXCEEDED ITS POWERS UNDER THE COMMERCE CLAUSE WHEN IT ENACTED THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994.

Congressional power under the Commerce Clause is checked by federalism, one of the bedrock principles undergirding the United States Constitution. This Court has repeatedly cautioned that:

> [T]he scope of this [Commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, *would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.*

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (emphasis added).

This Court is well aware of the clear limits on the Commerce Clause power exercised by Congress in enacting statutes that regulate essentially local conduct:

> [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. *Some activities may be so private or local in nature that they simply may not be in commerce.* Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity

> must have a *substantial effect* on interstate commerce.

Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring) (emphasis added); *See also Lopez*, 115 S.Ct. at 1628 (holding that even the expanded congressional power under modern-era precedents confirm that Commerce Clause power is subject to outer limits).

A. Congress Irrationally Invoked the Commerce Clause Power in Legislating FACE, Because the Same Logic Provides a Basis for Regulating All Human Activity.

From its inception, Congressional power to regulate commerce has been subject to the clearly expressed limitations "prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).[2]

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[2]Despite the modern view that *Gibbons* vastly expanded the reach of the Commerce Clause, the modern view overstates the holding. "Marshall well understood the fact that local events affected interstate commerce, but he *rejected* it as a basis for extension of congressional power over internal matters." R. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1407 (1987). Epstein concludes:

> My conclusion is clear enough. I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government.

No constitutional limitation is more conspicuously unmistakable than our federal form of government. An overly expansive view of interstate commerce has the end result of obliterating federalism:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours is an elastic medium which transmits all tremors throughout its territory .... To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (internal quotations omitted).

Courts must review Congressional exercise of the Commerce Clause power to ensure Congress had a "rational basis" for invoking the Commerce Clause: "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276. Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.

Id. at 1388.

While "in a *strictly* logical sense, all activity affects commerce because virtually all activity requires commerce and all commerce requires activity[,]" *United States v. Wilson*, 1995 WL 114802 at *7 (E.D. Wisc. Mar. 16, 1995), the "rational basis" required for Congress to invoke the Commerce Clause power must require more than mere logical plausibility. In order for our federal system to survive Congressional power under the Commerce Clause, Congress cannot exercise the power "so expansively that it effectively subsumes other enumerated powers or those powers reserved to the States, or extends to *all* spheres of human activity." *Id.* at *9.

Congress cannot rationally exercise the Commerce Clause power if it uses reasoning that allows Congress to regulate in any sphere it chooses, in derogation of the enumerated, and limited, powers given to Congress. This Court so concluded early in the life of the Republic:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803). This logic has been further applied to the Commerce Clause power itself:

> [T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every

> description. The enumeration presupposes something not enumerated . . . .

Gibbons, 22 U.S. (9 Wheat.) at 194-95. Because Congress relied on a rationale which would extend the Commerce Clause power to any human activity in enacting FACE, thus greatly overstepping its Commerce Clause power, Congress has acted without any rational basis.

Indeed, the rationale used to justify Congressional power to reach virtually any activity strongly counsels against an unlimited commerce power. This Court has often observed that the commerce power increased as the United States grew and developed from an agrarian culture to an economic and commercial giant. *Lopez*, 115 S.Ct. at 1628 ("Enterprises that had once been local . . . had become national in scope.")

By extension of this same logic, in order to have a *substantial* effect on commerce in today's far-flung commercial colossus, an activity must exert a substantially greater commercial impact than activities which would have been deemed substantial in an earlier, simpler, era. Thus, the complexity and extensiveness of commerce in the United States today requires a commensurate recalibration of activities which substantially affect commerce. Otherwise, the commerce power swallows all other congressional powers.

B. Purely Local, Non-Violent, Non-Commercial Activity Does Not Affect Commerce, and Therefore Affords No Rational Basis for Exercising the Commerce Clause Power.

This Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 115 S.Ct. at 1629. The FACE Act falls within the third category of cases, "those activities having a substantial relation to interstate commerce." *Id.*

The FACE Act undisputedly regulates, *inter alia*, purely local, non-violent, non-commercial activity. *Wilson*, 1995 WL 114802 at *1; Petition for Writ of Certiorari at 5-7; *American Life League v. Reno*, 47 F.3d 642, 648 (4th Cir. 1995) (FACE Act might affect conduct with expressive elements, such as peaceful but obstructive picketing). To survive judicial scrutiny under the Commerce Clause, peaceful demonstrations must rationally be viewed as substantially affecting commerce. This Court has delineated three types of activities that affect commerce: (1) de minimis individual acts which in the aggregate undermine a national regulatory scheme; (2) commercial activities affecting interstate travel; and (3) violent means used to achieve an economic end. *Wilson*, 1995 WL 114802 at *10. Congress has exceeded its Commerce Clause power by enacting FACE, because the peaceful demonstrations proscribed by FACE do not fit any of the three patterns of activities deemed to affect commerce.

1. Peaceful Demonstrations Regulated by FACE are Not De Minimis Individual Acts Which in the Aggregate Undermine a National Commercial Regulatory Scheme.

Wickard v. Filburn, 317 U.S. 111 (1942) and *Perez v. United States*, 402 U.S. 146 (1971) are two examples of cases in which this Court found the Commerce Clause power justified the exercise of federal jurisdiction over

de minimis intrastate activities because the aggregate effect of such activities undermined a national regulatory scheme. *Wickard* involved a farmer who grew wheat in excess of the amount allowed under the Agricultural Adjustment Act of 1938 for his own personal consumption. The Court held that Congress had authority to establish national regulations to avoid surpluses and shortages of wheat. Accordingly, although the farmer's excess wheat appeared to be a negligible burden on commerce, if other farmers engaged in similar conduct, the cumulative effect would be a significant breach of the regulatory scheme.

Similarly, *Perez* involved intrastate "extortionate credit transactions" which individually appeared to be negligible by comparison with interstate commerce. However, Congress found that the aggregate effect of such transactions was an important tool for organized crime, and that these seemingly trivial intrastate activities jeopardized legitimate commercial enterprises. *Perez*, 402 U.S. at 155-56. Thus, because Congress had the power to establish a national commercial regulatory scheme, the seemingly trivial intrastate acts were swept within the power of Congressional regulation.

Unlike the statutes at issue in *Wickard* and *Perez*, Congress has established no national commercial regulatory scheme for reproductive health services clinics. The peaceful demonstrations banned by FACE are also completely separate from the abortion clinic facilities, and have no connection with any federal regulations. FACE is therefore not justified under this first class of cases involving activities that affect commerce.

2. Peaceful Demonstrations Regulated by FACE are Not Commercial Activities Affecting Interstate Travel.

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) involved Title II of the Civil Rights Act of 1964, and stand for the proposition that Congress has the authority to regulate commercial entities which receive goods moving in interstate commerce or which facilitate interstate travel. FACE is plainly distinguishable from these cases. Congress is not regulating the clinic facilities as commercial enterprises which receive goods moving in interstate commerce; Congress is instead attempting to regulate the non-commercial conduct of third parties which occurs near the clinics.

Further, *Katzenbach* was supported by Congressional findings that discrimination in restaurants and motels directly restricted the right of African-Americans to travel interstate. *Katzenbach*, 379 U.S. at 381. The FACE Act is not designed to ensure a right of interstate travel. To the contrary, FACE seeks only to regulate the conduct of third parties at reproductive health service clinics. "Plainly, the provision of reproductive health services, unlike food and shelter, is not a necessity of interstate travel." *Wilson*, 1995 WL 114802 at *14. FACE thus does not fit within this second class of cases involving activities affecting commerce.

3. Peaceful Demonstrations Regulated by FACE are Not Violent Means Used to Achieve an Economic End.

The final class of cases involving activities affecting commerce is exemplified by *Russell v. United States*, 471 U.S. 858 (1985) and *Stirone v. United States*, 361 U.S. 212 (1960). In *Russell*, this Court upheld Title XI of the Organized Crime Control Act of 1970, 18 U.S.C. § 844, *et seq.* under the Commerce Clause. At issue was an attempt to collect insurance proceeds by destroying rental property with a natural gas explosion. Similarly, *Stirone* upheld passage of the Hobbs Act pursuant to the Commerce Clause. The Hobbs Act regulates robbery and extortion, crimes which are violent in nature and are means to an economic end.

The conduct regulated in both *Russell* and *Stirone* went beyond a mere effect on commerce. The perpetrator in each case sought to deprive a person of his or her personal or real property using violent means. Unlike the conduct regulated in those cases, the peaceful demonstrations proscribed under FACE are neither violent nor economic in nature. Rather than having any commercial effect whatsoever, the conduct is political, social, philosophical, religious, or some combination thereof.

C. Congressional Findings About the Supposed Need for FACE are Universally Applicable to Virtually Any Activity; These Findings Therefore Provide No Rational Basis for Enacting FACE.

The United States District Court for the Eastern District of Wisconsin carried its analysis one step further and concluded that the legislative hisotry associated with

the enactment of FACE fails to provide a rational basis for invoking the Commerce Clause power. *Wilson*, 1995 WL 114802 at *17-23. The reasons advanced by Congress to justify using the Commerce Clause power are summarized below.

First, Congress found that abortion clinics operate within the stream of interstate commerce because they purchase medical and office supplies that move in interstate commerce. S. Rep. No. 117, 103d Cong. 1st Sess. 3 (1993); H.R. Conf. Rep. No. 488, 103d Cong. 2d Sess. 7 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 724. Of course, one would be hard pressed to identify *any entity* about which the same finding would not apply. The public school in Lopez also no doubt used supplies that moved in interstate commerce. Thus, this finding supports the regulation of *any* entity under the Commerce Clause, and provides no rational basis for such regulation within our federal system.

Second, Congress stated that some persons travel across state lines to perform or obtain abortions. S. Rep. No. 117 at 31; H.R. Rep. No. 488 at 7. The *Wilson* court disposed of this finding as follows:

> If some people cross state lines to go golfing, bowling, camping or shopping, can Congress regulate these activities? If 1,000 more people cross state lines to obtain abortions each year than do to go golfing, does that provide a rational basis for concluding that Congress may regulate trespass at reproductive health services clinics but not at golf courses? Of course not.

Wilson, 1995 WL 114802 at *18-19. This congressional finding applies with equal force to virtually any human

activity and therefore provides no rational basis for invoking the Commerce Clause power.

Interestingly, there apparently was no congressional finding that *protesters* travelled across state lines. Thus, like the Gun-Free School Zones Act of 1990, FACE "contains no jurisdictional element which would ensure . . . that the [peaceful demonstration] in question affects interstate commerce. *Lopez*, 115 S.Ct. at 1631.

Third, Congress asserted that peaceful demonstrations have hindered the ability of these clinics to provide services. S. Rep. No. 117 at 31. Once again, however, this assertion does not provide a rational basis to exercise the Commerce Clause power. This reasoning would allow Congress to use the Commerce Clause "to regulate any non-commercial intrastate activity that in turn negatively affects a commercial entity operating within the stream of commerce. The implications of such a power are immense and unprecedented." *Wilson*, 1995 WL 114802 at *19.

> Under this standard, Congress could regulate shoplifting because it reduces the supply of goods. It could regulate the use of cabs or busses because it reduces the demand for cars. It could regulate dieting because it reduces the demand for certain types of food. It could regulate breast-feeding because it reduces the demand for formula. It could regulate video rentals because it reduces the demand for theaters. It could regulate the use of computers and computer software because it reduces the demand for typewriters, books, etc.

Id. at *19, n.17.

Finally, Congress found that "existing criminal laws at the state and local levels have failed to provide the certainty of prosecution, conviction and punishment necessary to deter these activities on a nationwide scale." *Id.* at *20 (quoting S. Rep. No. 117). This finding is not enough. It certainly says nothing about whether the peaceful demonstrations proscribed by FACE substantially affect interstate commerce. Further, as the *Wilson* court noted, "[i]t would appear that this finding is significantly undercut when the legislative history contains no official plea for assistance from any state . . . ." *Wilson*, 1995 WL 114802 at *21. This finding is not only irrational, it is also downright disingenuous. Indeed, the States have historically retained the authority to define and enforce criminal law. *See Lopez*, 115 S.Ct. at 1631, n.3. Like the Gun-Free School Zones Act of 1990, FACE is a criminal statute that has *nothing* to do with commerce.

The foregoing analysis demonstrates persuasively that none of the Congressional findings in the legislative history of the FACE Act provide any rational basis for unleashing "the undeniable juggernaut of Congressional power . . . under the Commerce Clause." *Wilson*, 1995 WL 114802 at *25-26.

FACE sweeps within its ambit peaceful, non-violent, wholly intrastate conduct that contains no commercial aspect whatsoever. This activity (trespass) has historically been controlled solely by state and local authorities. In its attempt to regulate this activity, Congress has invoked the Commerce Clause power without having any rational basis to do so. Congress risks the demise of federalism by its literally unprecedented exaggeration of the Commerce Clause power beyond any limitation whatsoever. This Court must act decisively to arrest this alarming development.

Otherwise, this Court will have abdicated its duty "to say what the law is," *Marbury*, 5 U.S. at 177, and abandoned our federal system for "a completely centralized government." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

II. FACE DISCRIMINATES ON THE BASIS OF THE CONTENT OF SPEECH, IN VIOLATION OF THE PRINCIPLES SET FORTH BY THIS COURT IN *REGAN v. TAXATION WITH REPRESENTATION OF WASHINGTON*, 461 U.S. 540 (1983) AND *ARKANSAS WRITERS' PROJECT, INC. v. RAGLAND*, 481 U.S. 221 (1987).

This Court has consistently held that the Government may not suppress an individual's freedom of speech based solely upon the content or viewpoint of that speech. "'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech, or of the press."'" *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (quoting *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 546 (1980)) (Stevens, J., concurring in judgment). Indeed, almost twenty-five years ago, this Court made clear that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), this Court was asked to determine whether a provision of the Internal Revenue

Code, 26 U.S.C. § 501(c)(3), was content neutral. The statute at issue disallowed tax-exempt status to organizations that "attempt[ed] to influence legislation," but at the same time provided tax-exempt status to veterans' organizations irrespective of their lobbying activities. While acknowledging that the statutory provision discriminated between veteran's organizations and all other charitable organizations, this Court found that such discrimination was not impermissible: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas."' . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1950)) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958))).

Unlike the statute at issue in *Regan*, FACE has the effect of suppressing ideas. The Fourth Circuit admitted as much when it found that "[t]he Act might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing." *American Life League*, 47 F.3d at 648.

In *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987), this Court again ruled on whether a particular statute was content neutral. In *Ragland*, a state sales tax statute discriminated on its face between magazines based on the content of the publications. Because of that fact, among others, this Court held the tax invalid because the law singled out a particular group on the basis of speech content.

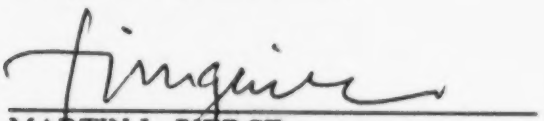
Given this Court's decisions in *Regan* and *Ragland*, the provisions of FACE are clearly viewpoint-based. Under the plain terms of the statute, the only

type of speech that is prohibited is that directed to persons who are obtaining or providing reproductive health services. Indeed, the statement of purpose set forth in FACE could not be any more discriminatory: "it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services." Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 1994 U.S. Code Cong. & Admin. News 699. Such a prohibition of only certain types of speech is clearly aimed at the impermissible "suppression of dangerous ideas." *See American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Cammarano*, 358 U.S. at 513.

CONCLUSION

For these reasons, LCDL respectfully requests this Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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